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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on January 8, 1963.

OPINIONS BELOW

The opinions of the district court (East. A. 5-25, 26-33)[1] are reported at 202 F. Supp. 297 and 210 F.

[1] Nine copies of the record appendices printed for the use of the court of appeals have been filed in this Court, together with one copy of the supplemental proceedings in the court below. The pages in petitioners' record appendix (white volume) are referred to in this petition as "(East. A. ,)."

Supp. 822. The opinion of the court of appeals is reported at 312 F. 2d 214 and is set forth in Appendix A, pp. A1-A16 *infra*.

JURISDICTION

The judgment of the court of appeals was entered January 8, 1963. On March 26, 1963, the time to file this petition was extended by order of Mr. Justice Goldberg to and including June 7, 1963. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Petitioners bareboat chartered vessels from the former Maritime Commission under Section 5 of the Merchant Ship Sales Act of 1946. That section made applicable to such charters section 709(a) of the Merchant Marine Act, 1936, which specified a 50 percent division with the Government of profits earned by the chartered vessels in excess of a return of 10 percent on capital employed in the operation of the vessels. Maritime promulgated a form of charter, which in substance rewrote section 709(a), to substitute a sliding scale of profit sharing up to 90 percent for the statutory 50 percent.

> The first question is whether Maritime was authorized to increase the 50 percent share of profits specified by section 709(a) to the sliding scale shares up to 90 percent.

2. In mid-1947, a sharp decline occurred in shipping and Maritime, foreseeing a reduction of its share of profits because of losses anticipated later in that year, notified the charterers of termination of the charters as of September 1, 1947, with the option of continua-

tion on condition that the results of voyages after September 1 be accounted for separately from voyages prior to that date,

The second question is whether this requirement, dividing the calendar year 1947 into two parts for profit sharing computations, violated the provision of section 709(a) prescribing "calendar year" accounting of "cumulative" net profits.

STATUTES INVOLVED

Sections 5(b) and 5(c) of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1738(b) and (c)) provide:

> (b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). . . . [R]ates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.
>
> (c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

Section 709(a) of the Merchant Marine Act, 1936 (46 U.S.C. 1199) provides:

> Sec. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any

calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

These statutory provisions, and the regulations and charter clauses modeled thereon, are set forth in parallel form on the foldout sheet attached to this petition as Appendix B.

STATEMENT

A. The Charters

1. The Merchant Ship Sales Act of 1946, approved March 8, 1946, directed the Maritime Commission to terminate government operation of the war-built merchant fleet after World War II, and set forth the terms upon which government vessels were to be sold or chartered to private steamship companies. The purpose of the Act was to rehabilitate the private merchant marine whose operations had been disrupted, and fleets decimated, by war losses and requisition.

2. In mid-August 1946, Maritime acting under Section 5 of the 1946 Act adopted a standard form of Ship Sales Act charter (called "SHIPSALESDEMISE 303"). In this charter the "basic charter hire" rate was fixed pursuant to Section 5(b), *supra*, at 15 percent per an-

num of the statutory sales price of the vessels (East. A. 70). In fixing "additional charter hire" referred to in Section 709(a), *supra*, Maritime substituted sliding scale rates of 50, 75 and 90 percent for the 50 percent specified in that section. The 50 percent rate had been incorporated in the earlier WSA form of charter[2] employed during the interim period from March to August 1946 (App. B *infra*; East. A. 76).

3. The charterers protested the sliding scale of "additional charter hire" rates because they conflicted with section 709(a) and, following these protests, but before execution of the charters, Maritime added a clause which provided that profit sharing payments would be "preliminary". Martime also issued regulations and instructions providing that the making of payments would not "prejudice the rights of either [party] under the applicable bareboat charter agreement or otherwise."[3]

4. In general, the charterers, including petitioners, sustained losses in late 1946 from the operation of the vessels under the charters. On voyages during the first part of 1947 they made profits sufficient to require profit sharing payments in excess of 50 percent. The

[2] The War Shipping Administration was authorized to charter vessels by Public Law 101, 77th Cong., 1st Sess., Act of June 6, 1941 (55 Stat. 243, 50 U.S.C. App. 1273(a)).

[3] East. A. 11-13; App. B, quoting 46 C.F.R. 299.31(k) and 299.56(b)(5); 46 C.F.R. 299.39(a), (b); 46 C.F.R. 299.40(c). The industry protests, and the amendment of the charters to reserve the charterers' right, are summarized in the *en banc* decision of the Court of Appeals for the Second Circuit in *American Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, *cert. denied*, 368 U.S. 895 (1961). See especially the majority opinion of Judge Smith, 291 F. 2d at 602, and the dissent of Judges Friendly and Moore, *id.* at 613-615.

charter market then declined sharply, and Maritime, concerned about losing its excessive shares of profits, advised the charterers, including petitioners, on August 15, 1947, that their charters would be terminated as of September 1, 1947, but could be extended on condition that the losses from voyages after September 1 be accounted for separately from the profits of voyages commenced before that time.[4]

5. The effect, in petitioners' case, of the sliding scale and split year accounting is to allocate to the Government $516,000 of profits for the first eight months of 1947 and to petitioners $196,000 for that period. For the last four months of 1947, however, the vessels operated at a loss of $246,000 which, because of the divided accounting in 1947, did not affect the share of profits allocable to the Government but converted petitioners' profits from the earlier period into an overall loss of $50,000. The net result is that if the Government's position is sustained on the two disputed issues,

[4] Maritime's reason for threatening to terminate the charters is recited in its annual report to Congress for the fiscal year ended June 30, 1948 (p. 14), as follows:

> This action was designed to require the charterer to carry on all operations after August 31, 1947, without off-setting future losses against additional charter hire due the Government, from voyage profits for the prior period.

Petitioners were bound under subcharters for voyages with at least two of the vessels after September 1, 1947. These subcharters had been approved in advance by Maritime for performance after September 1, 1947 (East. A. 30-31). The subcharters contained a clause permitting petitioners to escape if Maritime terminated the bareboat charters; but Maritime's action, continuing the bareboat charters on condition that petitioners account separately for the two portions of the calendar year, did not relieve petitioners of their obligation under the subcharters, because the escape clause did not apply in case of conditional continuation of the bareboat charter.

petitioners will suffer a loss on the charter while the Government will receive not only $516,000 of the profits for the first eight months of 1947 but also more than $700,000 of basic charter hire collected for the use of the vessels over the period of the charter (East. A. 109, 115).

6. After the "final audit" of operations petitioners brought an action under the reservation of rights clause of the charter to recover hire overpaid on their theories of the proper construction of the statutes, and the Government counterclaimed for alleged unpaid amounts (East. A. 11-13).

B. The Decision Below

The court below decided both the sliding scale and the split accounting issues in favor of the Government, and affirmed the judgment against petitioners for the unpaid profit sharing hire. It held that the general provisions of section 5(b) of the 1946 Act authorizing charter hire "consistent with the policies of this Act" permitted Maritime to modify the specific fifty-fifty profit sharing provision and the calendar year accounting provision of section 709(a) (App. A 14 and A 15). It construed section 709(a) as fixing a minimum profit sharing formula in favor of the Government for purposes of the 1946 Act, although apparently recognizing that it fixed a maximum and minimum for purposes of the 1936 Act. It relied for this holding upon the "dominant purpose of the 1946 Act, . . . to sell vessels not to charter them, . . ." and said that "the important consideration was to avoid making charters too cheap." (App. A 13)

The court below also held it to be immaterial that Maritime had relied upon section 709(a) in fixing

the profit sharing in excess of 50 percent. It found such misreliance to be merely a matter of form and not substance. It rejected the contention of petitioners that section 709(a) fixed the profit sharing formula and thus controlled this feature of the charters to the exclusion of section 5(b); and that Maritime's misreliance involved a matter of material substance, not merely a matter of form.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With a Decision of the Court of Claims and With Several Other Decisions

The court below expressly recognized the conflict on the profit sharing issue between its decision and the decisions of (a) the Court of Claims in *American Export Lines, Inc.* v. *United States*, 290 F. 2d 925 (1961), (b) the District Court for the Southern District of New York in *Dichmann, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (1956), and (c) the District Court for the Western District of Washington in *American Mail Line, Ltd.* v. *United States*, 213 F. Supp. 152 (1962).

These courts held that if Maritime invoked section 709(a), its action was unauthorized whether or not section 5(b) might have authorized it if invoked.[5] The Court of Claims in *American Export Lines* and the district court in *American Mail Line* (after a trial) found as a fact that Maritime had relied upon section 709(a), and it is submitted that this is conclusively supported by the record (App. B). The view of the

[5] This was also the holding of *United States* v. *East Harbor Trading Corp.*, 190 F. Supp. 245, 249 (1960), but the court there left open for trial the issue of whether Maritime in fact relied upon section 709(a) or upon section 5(b).

court below, that section 5(b) may be invoked retroactively to justify action taken in attempted reliance upon section 709(a), violates the principle that the courts may not supply a rationale for agency action which that agency never considered. *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962); *Bell* v. *United States*, 366 U.S. 393, 412 (1961); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87, 93-94 (1943); *United States* v. *Morgan*, 313 U.S. 409, 421-22 (1941).

The views expressed by Judges Friendly and Moore of the Court of Appeals for the Second Circuit in the litigation finally reported as *American-Foreign Steamship Corp.* v. *United States*, 291 F. 2d 598, 613, *cert. denied*, 368 U.S. 895 (1961), and the dictum of the Second Circuit in *Sword Line* v. *United States*, 228 F. 2d 344, 346 (1955), *aff'd as to admiralty jurisdiction*, 351 U.S. 976 (1956) support the charterer's version of the facts and law, and also suggest a conflict. On the other hand, the decision below has recently been treated as authoritative in *United States* v. *Eastport Steamship Corp.* (S.D.N.Y.—April 26, 1963, unreported).

2. Litigation of Wide Scope is Affected

Between 1946 and 1951, Maritime collected approximately $395,000,000 as basic charter hire and $80,000,000 as profit sharing hire under the Ship Sales Act charters.[6] Of the latter amount, some $20,000,000 is involved in disputes turning on the questions presented

[6] Taken from pages 201a and 225a of affidavit of Charlie H. McDaniel, sworn to May 14, 1956, filed by the Government in *Smith-Johnson Steamship Corp.* v. *United States*, 142 F. Supp. 367 (Ct. Cl. 1956).

here. Part of this has been paid to Maritime and part is unpaid and subject to pending or potential suits by the Government.

Of the approximately ninety charterers involved in the chartering program, some thirty who were adversely affected have commenced suits throughout the United States which await authoritative decision of the split accounting and sliding scale issues. The Government has also recently filed libels against some of these charterers, and against others not heretofore involved in litigation, and their sureties, to recover unpaid amounts. The total number of suits and cross-suits now pending approximates sixty.

Starting in approximately 1956 Maritime also suspended all audits of the accountings of the charterers pending final decision of these issues by the courts.[7] In these accountings, the two disputed issues are in most cases interrelated, and a decision on the sliding scale issue alone will not permit completion of the accountings unless a decision is also reached on the split accounting issue. Authoritative decisions on both issues by this Court are therefore necessary not only to guide the lower courts but also to enable resumption of audits, already long delayed, and to permit settlement of the rights and liabilities of the charterers and their sureties.

The Government claims profit sharing hire from certain subsidized operators, and Maritime is required, by section 609 of the 1936 Act (46 U.S.C. 1179), to withhold subsidy in these circumstances. While there are presently no suits pending in the Court of Claims,

[7] Annual Report of the Federal Maritime Board/Maritime Administration for Fiscal Year Ended June 30, 1956, page 29, Report For Fiscal Year Ended June 30, 1957, page 30.

that court will have jurisdiction of suits for recovery of any such withholdings and the decision in *American Export Lines, Inc.* v. *United States, supra,* which conflicts with the decision below would be controlling.

Maritime currently is empowered to make bareboat charters under both the 1936 and 1946 Acts, and the question of its power to modify the profit sharing formula of section 709(a) under these acts will continue to exist until settled by this Court. Further, the Merchant Marine Act, 1936, contains many other mandatory provisions,[8] like section 709(a), which must be inserted in contracts and charters, and Maritime's authority to modify these sections under general provisions of the 1936 Act may be affected by the decision below.

3. The Decision Below Is Clearly Erroneous

The correctness of the decision below depends upon (i) whether the language of section 5(b), read *in pari materia* with section 709(a), may reasonably be construed to authorize the fixing of a profit sharing rate,

[8] In the 1936 Act, for example, are the following mandatory sections: section 505(b) ("No contract shall be made for the construction of any vessel under this Act unless the shipbuilder shall agree . . ."); section 506 ("Every owner of a vessel for which a construction-differential subsidy has been paid shall agree . . ."); section 603(b) ("Such contract shall provide that . . ."); section 606 ("Every contract for an operating-differential subsidy under this title shall provide . . ."); section 607(a) ("Every contract for an operating-differential subsidy made under authority of this title shall provided . . ."); section 709(b) ("Every charter shall contain a definition of the terms . . ."); section 712 ("Every charter shall provide . . ."); section 801 ("Every contract executed by the Commission under the provision of titles VI or VII of this Act shall contain provisions requiring . . ."); section 802 ("Every contract executed by the Commission under authority of title V of this Act shall provide . . .").

and (ii) whether section 709(a) may be construed as fixing a minimum in favor of the Government, and not a maximum and minimum.

(a) *The statutory language.* It is submitted that a normal reading of section 5(b) leads to the conclusion that that section was intended to authorize only a fixed bareboat rate based upon a percentage of the statutory sales price of the vessels chartered. It provides for charter hire "at such *rate* as the Commission determines to be consistent with the policies of this Act, . . ."[9] The only reference to rates in section 5(b) is to (i) a rate not less than 15 percent per annum of the statutory sales price, and (ii) a rate not less than the "world market rate." The section does not remotely suggest a rate based upon a percentage of profits.

Section 709(a), on the other hand, carefully defines a fifty-fifty profit sharing formula and requires such a clause in the charters. Not only does 709(a) specify the profit percentage, but it also fixes (a) the rate of return on capital, (b) the deduction of overhead and basic charter hire in computing profits to be shared, (c) the calendar year basis of accounting and (d) the cumulation of profits and losses from year to year. It seems elementary, therefore, that Congress intended section 709(a) to fix the formula in all these respects and that section 5(b) was not intended to authorize its alteration. It further seems clear that Maritime could not reach a determination under section 5(b) that profit sharing up to 90 percent was "consistent with the policies of this Act, . . ." when the same Act fixed 50 percent. Not only did section 709(a) not authorize

[9] Emphasis added in quotations unless otherwise indicated.

the sliding scale percentages, it affirmatively precluded these percentages.

It requires strong evidence to discard the rudimentary rule of statutory construction, that a specific statutory provision controls over a more general one,[10] and that statutes should be construed in such a way as not to render any portion thereof superfluous and meaningless.[11] The existence of the mandatory profit sharing in section 709(a) dispels any possible inference that the same concept was contemplated by section 5(b), which refers unambiguously to a rate based upon a percentage of statutory sales price.

(b) *There is no basis for construing section 709(a) differently in the 1946 Act than in the 1936 Act.* All of the courts which have considered this question, including apparently the one below, have concluded that, for purposes of the 1936 Act, section 709(a) fixes a minimum and a maximum profit sharing rate. But the court below has concluded that, for purposes of the 1946 Act, the section fixes a minimum only. This interpretation rests upon the assumption of an overriding policy of the 1946 Act, to sell vessels rather than

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[10] *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961); *Fourco Glass Co.* v. *Transmirra Prod. Corp.*, 352 U.S. 222, 228-29 (1957); *MacEvoy* v. *United States*, 322 U.S. 102, 107 (1944); *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929); *Raleigh & G. R. Co.* v. *Reid*, 13 Wall. 269 (1872); *cf. Sword Line* v. *United States*, 228 F. 2d 344, 346 (2 Cir. 1955), *affirmed as to admiralty jurisdiction*, 351 U.S. 976 (1956).

[11] *Jarecki* v. *Searle & Co.*, 367 U.S. 303 (1961); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); *Ex parte Public Nat. Bank*, 278 U.S. 101, 104 (1928); *Washington Market Co.* v. *Hoffman*, 101 U.S. 112-13 (1879); *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866, 873-74 (4 Cir. 1962).

to charter them, and a purpose to "avoid making charters too cheap." (App. A 13).

But there is nothing either in the statutory language or the legislative history to support this conclusion as to overriding policy. The statutory language of the 1936 and 1946 Acts shows closely parallel draftsmanship and purpose. Each act contains a substantially identical statement of policy, *i.e.*, to develop and expand the merchant marine in private hands (1936 Act—46 U.S.C. 1101; 1946 Act—50 U.S.C. App. 1735); each authorizes a minimum rate of charter hire of "not less than" a fixed percentage of a selling price independently established ("not less than" 8½[12] per centum per annum, 1936 Act—46 U.S.C. 1204; "not . . . less than 15 per centum per annum," 1946 Act—50 U.S.C. App. 1738(b)). The policy of each was to prefer the sale of vessels to charters,[13] but charters were to be made under each act to the extent required to build up the merchant marine (1936 Act—46 U.S.C. 1204; 1946 Act—50 U.S.C. App. 1740). Under each act, section 709(a) was a mandatory clause in the charters (46 U.S.C. 1199(a); 50 U.S.C. App. 1738(c)).

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[12] The 8½ percent floor was reduced to 7½ percent in June 1960. See 46 USCA 1204, Annotations.

[13] The legislative history of section 5(b) of the 1946 Act shows that the 15 percent rate was regarded by Congress as sufficiently high to encourage sales and discourage chartering. Basic charter hire in the early drafts of the 1946 Act was set at 8½ percent of the sales price, this percentage no doubt being taken directly from section 714 of the 1936 Act. Later drafts increased the rate, first to 12½ percent, and then to 15 percent. Congress noted that that rate might unduly hinder charters, and therefore provided in section 5(b) that it might be lowered under certain conditions. See H.R. 4486, 78th Cong., 2d Sess. (1944); S. Rep. No. 807, 79th Cong., 1st Sess. 13-14 (1945); H.R. Rep. No. 831, 79th Cong., 1st Sess. 8 (1945); 91 Cong. Rec. 11552, 11873 (1945); hearings before the House Committee on Merchant Marine and Fisheries on H.R. 1425, 79th Cong., 1st Sess. 468-70 (1945).

Section 706 of the 1936 Act (46 U.S.C. 1196) provided for basic rates fixed by competitive bids, but with a floor of 8½ percent of the price set by section 714 (46 U.S.C. 1204). And, if successful development of essential trade routes could not be accomplished with privately owned vessels, Maritime was authorized, by section 714, to construct new vessels and bareboat charter them, without competitive bids, but at negotiated rates of not less than 8½ percent of price.

Thus, both acts give authority to fix basic rates, subject to floors, and both require an equal division of profits. The court below was in error in finding a distinction between the two acts in this respect. Section 709(a) fixed a ceiling and a floor in the 1936 Act, and that section should be so interpreted in the 1946 Act.[14]

There is not the slightest suggestion in the legislative history that there was a different governmental policy in 1946 with respect to the American merchant marine than that which existed in 1936. Both acts sought to establish a healthy merchant marine, and this could not be accomplished by stifling the profit incentive. The 1936 Act sought to build up a failing industry necessary for national defense; the 1946 Act to restore an industry torn by World War II. If, in 1936, the profit sharing policy was 50 percent, it is only proper to conclude that Congress intended that policy to obtain when it placed section 709(a) in the 1946 Act.

(c) *The agency action taken under the statutes.* The court below concluded that the sliding scale could be justified under section 5(b) even though Maritime had

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[14] *United States* v. *Gertz*, 249 F. 2d 662, 665 (9 Cir. 1957); *United States* v. *Cooper Corp.*, 312 U.S. 600, 607-08 (1941); *Commissioner* v. *Ridgeway's Estate*, 291 F. 2d 257, 259 (3 Cir. 1961).

in fact relied upon section 709(a) in fixing the excess charge. While petitioners contend that this position is unsound, it may be helpful in considering the correctness of the decision below to relate the reasoning of Maritime in taking its action fixing the charter hire. This negates any intention of fixing profit sharing under section 5(b), and proves beyond doubt that Maritime rewrote section 709(a) because it thought the fifty-fifty profit sharing formula was not adequate for the Government.

The memoranda and minutes of Maritime reveal that that agency selected the 15 percent basic rate rather than some higher rate because (i) a decline was forecast in business for United States flag vessels owing to competition from vessels being sold under the 1946 Act for foreign flag operation (East. A. 48, 65-66); (ii) certain types of vessels would not justify a rate as high as 15 percent, and it was not practicable to set separate basic rates for different types of vessels in different trades (East. A. 55); and (iii) Maritime otherwise exercised control over profits by specifying the trades in which the vessels could be operated and the level of rates charged to shippers (East. A. 49, 77-90). Furthermore, and most important, (iv) Maritime actually considered raising the 15 percent rate, but refrained because the Government itself would be adversely affected financially.[15]

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[15] East. A. 97. As was said in *American Mail Line, supra* 213 F. Supp. at:

> Maritime considered increasing the basic charter hire rate of 15 percent per annum of the statutory sales price but did not do so because of protests from other government agencies, the Army and the State Department. These agencies had sub-time/voyage/space charters with various operators containing escalation clauses providing that if the operators' basic hire was increased by Maritime, the rate of hire specified in the subcharter would be adjusted accordingly.

The record also shows that Maritime, after fixing the basic rate at 15 percent, simply modified the profit sharing formula in the charters because it thought the share set by Congress was not adequate.[16]

The court below was also in error in finding that misreliance by Maritime upon section 709(a) was a matter of form and not substance. This conclusion overlooks not only the principle of the cases cited above at p. 9, but also the difference in scope and effect of the two statutory sections. Section 5(b) requires an administrative determination of consistency with the policies of the act—not present in section 709(a). Hence, if Maritime acted under section 709(a), the court below was not entitled to speculate that it might have acted in the same manner under section 5(b), without thereby substituting its judgment as to what Maritime might have determined would be consistent with the policies of the act.

Moreover, if the excess sliding scale share is justified by reliance upon section 5(b), accounting consequences

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[16] Maritime's memoranda and minutes repeatedly refer to an increase in the rate of "additional charter hire," a term found only in section 709(a). See the August 8, 1946, memorandum (East. A. 56):

> All of the Committee members, except one, agree that the *additional charter hire of 50% of the profits in excess of 10% of Capital necessarily employed in the business should be increased*. A minority of the Committee, however, feel that the revised percentage being recommended is too high.

A telegram to charterers was proposed, as follows (East. A. 63):

> 3. THE *ADDITIONAL CHARTER HIRE* PAYABLE TO THE OWNER WILL BE NINETY PERCENT OF THE NET VOYAGE PROFIT IN EXCESS OF THE TEN PER-CENT PER ANNUM ON CHARTERER'S CAPITAL NECESSARILY EMPLOYED *INSTEAD OF FIFTY PER-CENT AS HERETOFORE*.

follow under the provisions of section 709(a), which materially reduce the amount of profits payable to the Government (East. A. 40-42). This question should not have been brushed aside by the court below as a technicality.

(d) *Divided accounting in 1947.* Section 709(a) provides for additional charter hire, "whenever, *at the end of any calendar year* . . . . the cumulative net voyage profits" exceed the allowable 10 percent return. This language means that revenue and expense (upon which profit is based) and capital necessarily employed (upon which the 10 percent return is based) are to be computed on an annual—and more precisely, on a calendar year—basis. *United States* v. *Moore-McCormack Lines, Inc.*, 308 F. 2d 866 (4th Cir. 1962), *cert. denied* U.S. (1963), held that these annual results are to be cumulated or offset in computing profits to be divided with the Government.

The court below has sanctioned the practice of requiring accounting on a fractional year basis, so that profits for a portion of a year may be subjected to an additional charter hire requirement without reduction by losses suffered in other portions of the same year. This view reads out of section 709(a) the concept of cumulation as well as the requirement of calendar year accounting. And it conflicts with the purpose of these provisions, which is to enable vessel operators to protect themselves against the extreme business cycles regularly experienced in the shipping business, by permitting them to accumulate profits in prosperous periods to offset losses in depressed periods. *United States* v. *Moore-McCormack Lines, Inc., supra* at p. 872.

The court's decision on split accounting rests on the same error as that with respect to the rate of addi-

tional charter hire—its view that section 709(a), as incorporated in the 1946 Act, is a floor under but not a ceiling over the Government's share. As shown above, the language and legislative history of both acts indicate the contrary. This Court has often recognized that what a statute prohibits to be done directly may not be accomplished indirectly in the guise of a contract condition upon the grant of the benefits of the statute.[17] Even if there were a valid contract right to terminate the charters, not involving circumvention of statute, that right could not be exercised in bad faith in order to coerce modification of the original contract.[18]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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May 16, 1963

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[17] *Hunt Oil Company* v. *Federal Power Commission*, 300 F. 2d 429 (5th Cir. 1962); *Fidelity & D. Co.* v. *Tafoya*, 270 U.S. 426, 434 (1926); *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922); *Clapp* v. *United States*, 117 F. Supp. 576 (Ct. Cl. 1954), cert. denied, 348 U.S. 834 (1954); *Shay* v. *Agricultural Stab. & Conserv. State Com. for Ariz.*, 299 F. 2d 516, 522 (9 Cir. 1962).

[18] *Goltra* v. *Weeks*, 271 U.S. 536, 548 (1926); *United States* v. *Johnson*, 153 F. 2d 846, 849 (9 Cir. 1946); *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. 2d 302, 318 (2 Cir. 1955).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6035.

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES, *Libelants-Appellants*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee*.

Appeal from the United States District Court
For the District of Massachusetts.

[202 F. Supp. 297, 1962 A.M.C. 445; 1962 A.M.C. 1162]

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

J. Franklin Fort, with whom *James S. Eastham*, *William M. Brady*, *Israel Convisser* and *Kominers & Fort* were on brief, for appellants.

Lawrence F. Ledebur, Attorney, Department of Justice, with whom *Joseph D. Guilfoyle*, Acting Assistant Attorney General, *W. Arthur Garrity, Jr.*, United States Attorney, and *Morton Hollander* and *Leavenworth Colby*, Attorneys, Department of Justice, were on brief, for appellee.

OPINION OF THE COURT.
January 8, 1963.

ALDRICH, *Circuit Judge*. This libel and cross-libel in personam were brought to recover rental, or charter hire, alleged by libelants to have been overpaid, and by cross-libelant to have been underpaid, in connection with bare-

boat charters of merchant vessels by the former United States Maritime Commission to Massachusetts Trustees of Eastern Gas and Fuel Associates, hereinafter in the singular, Eastern. Basically the case raises the question of whether a profit-sharing lease, with a sliding scale calling for payments surpassing 50 per cent of the net voyage profits in excess of 10 per cent was unlawful. The district court held it was not, dismissed the libel, and rendered a money judgment in favor of the government on its cross-libel. Eastern appeals.

The charters were executed pursuant to the Merchant Ship Sales Act of 1946, hereinafter the 1946 Act, the most pertinent portion of which is section 5(b).

> "The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). . . ." 50 U.S.C. App. 1738(b).

In addition, subsection (c) of this section adopted certain provisions of the Merchant Marine Act of 1936, hereinafter the 1936 Act, the presently most important of which is section 709(a).

> "Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charter's fair and reasonable overhead expenses applicable to operation of the chartered vessel(s) shall exceed 10 per centum per annum on the charterer's capital neces-

sarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years." 46 U.S.C. § 1199(a).

Further provisions will be referred to later.

The original agreement, under which a number of vessels were chartered, was executed November 7, 1946. It provided for two separate types of rental. One, described as the "Basic Charter Hire" was a flat daily, sometimes called monthly, payment at the rate of 15 per cent per annum of the statutory sales price, which was the minimum amount required by section 5(b). A further paragraph, entitled "Additional Charter Hire," provided for the payment of "Cumulative net voyage profit in excess of 10% per annum on capital necessarily employed not in excess of $100 per day—50%" (precisely in accordance with section 709(a), but provided further that if the net voyage profit as defined exceeded $100 a day, 75 per cent of certain excess, and 90 per cent of any balance, hereinafter called the larger percentages, would be due. Eastern's operations until the termination of this charter on September 1, 1947, resulted in cumulative net voyage profits in excess of $100 per day. It paid the government some, but not all, of the larger percentages, and thereafter instituted this libel for their recovery. The government's cross-libel seeks payments of the balance.

In its brief Eastern asserts that the "'basic charter hire' was fixed by Maritime under section 5(b) of the 1946 act . . . [and the] 'additional charter hire' was a profit-sharing arrangement *fixed under section 709(a)* of the Merchant Marine Act of 1936. . . ." (ital. suppl.) The

charter makes no such specification. Eastern's assertion would seem to us, at first blush, merely an employment of the device of giving a dog a bad name and then hanging him for it. If in fact the only authorization for the profit-sharing arrangement was section 709(a), it would seem only too clear that the government's case must fall. Eastern's assertion that the Commission was in that position would seem merely an attempt to assume the point in issue. However, since other courts have taken precisely this approach, we must consider it.

In *American Export Lines, Inc.* v. *United States*, Ct. Cls., 1961, 290 F.2d 925, a case involving an apparently identical lease, the court said, at p. 927, "Section 5(b) of the Merchant Ship Sales Act of 1946 . . . provided for a basic charter hire[1] to be fixed at such rate as the Commission determined to be consistent with the policies of the Act, but at not less than 15 percent of the statutory sales price. . . ." 290 F.2d at 927. The court thereafter stated as one of the issues in the case, "Was the Commission authorized under section 709(a) of the Merchant Marine Act of 1936 to charge additional charter hire on a sliding scale of 50, 75 and 90 percent of the cumulative voyage profits . . .?" It proceeded, "As a subsidiary question, was the additional charter hire in excess of 50 per cent of the cumulative net voyage profits a part of the basic

[1] The words "basic charter hire" are contained in the charter, but are not to be found in the statute. We note this fact because the court's use of these words constitutes, in our opinion, the first turn in a wrong road. These words may be a convenient and appropriate description for certain purposes, but, as will be developed later, the court uses them for purposes of statutory construction as if they had been contained in the statute itself.

While we are on this subject we might add that Eastern is content to adopt the argument based on these words. At the same time it is indignant with the government for making a counter-argument by substituting the phrase "minimum primary rental," decrying it as "supermarket and department-store terminology." Thus it all depends on whose Oxford is gored.

charter hire under section 5(b) of the Merchant Ship Sales Act of 1946?" 290 F.2d at 928.

The court concluded without difficulty, citing *Dichman, Wright & Pugh, Inc.* v. *United States*, D.C.S.D.N.Y., 1956, 144 F. Supp. 922, and *United States* v. *East Harbor Trading Corp.*, D.C.S.D.N.Y., 1960, 190 F. Supp. 245, that section 709(a) did not authorize the charging of more than 50 per cent of the net voyage profits. With this we quite agree, as did the court below. Then, with respect to the so-called subsidiary question, whether these larger amounts were inserted in the charter pursuant to the Commission's authority under section 5(b), the court said, "It may be the charter could have provided [this] . . . but the fact is that it did not so provide." Having thus decided that all that was done under section 5(b) was fixing 15 per cent as the "basic charter hire," the court concluded that the Commission had no further authority except what was conferred upon it by section 709(a), which section, as it had already decided, was insufficient to warrant the imposition of the larger amounts.

In *Dichman, Wright & Pugh, Inc.* v. *United States, supra*, cited by the court in *American Export Lines*, the court went further, in a dictum, conceding rather than stating as a "may be," that the larger amounts could legally have been imposed under section 5(b) had the Commission in fact done so. However, like *American Export*, the court then examined the agreement and concluded it had not done so. Finally,[1a] in *United States* v. *East Harbor Trading Corp., supra*, on a motion for summary judgment, the court adopted this dictum of the *Dichman* case, but held that it was a question for further proceedings to determine

[1a] After this opinion was written our attention was called to the case of *American Mail Line, Ltd.* v. *United States*, D.C. W.D. Wash., 12/19/62, also decided against the government. It adds nothing requiring separate discussion.

which section of the statute the government had in fact proceeded under.[2]

In the present case the district court, after reviewing these earlier decisions, dismissed their approach as a "recondite technicality." We must agree. The charter in no way stated that one of its paragraphs was the product of, or was inserted by virtue of, one section of the statute and the other of the other. The charter was an integrated agreement that made no reference to the statute in any particular. The Commission had a single, overall obligation to fix a charter hire.[3] It was but natural to place the formula for computing fixed, and the formula for computing contingent, rental in two separate paragraphs. Simply because the charter described the fixed charge as the "basic charter hire" and the Court of Claims[4] interpreted section 5(b) as "basic charter hire," and because the second paragraph was entitled "Additional Charter Hire" (in this case words used in ction 709(a), but equally descriptive and applicable to the charter provision whether within section 709(a) or not) the court concluded that the Commission had acted outside of its authority, although

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[2] These district court decisions may have constituted an empty victory for the shipping companies, as it was subsequently held that a number of pending suits for recovery of such payments allegedly illegally exacted were time-barred. *American-Foreign Steamship Corp.* v. *United States*, 2 Cir., 1961, 291 F. 2d 598, *cert. den.* 368 U.S. 895. *But cf. American Mail Line, Ltd.* v. *United States*, *supra* n. 1a. We do not consider that question, however, because in the case at bar all payments have not been made.

[3] It was to make contracts "in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." Section 207 of the 1936 Act, 46 U.S.C. 1117, incorporated into the 1946 Act by section 12 thereof, 50 U.S.C. App. 1745.

[4] 290 F 2d at 930-31, perhaps the best articulation of this point. Another argument is used in *Dichman, Wright & Pugh, Inc.* v. *United States*, *supra*.

conceding it might have provided exactly this, so far as substance was concerned, had it used some other form of expression.

To say that the Commission stultified itself by its choice of format is to elevate semantics above substance. Appellate courts frequently affirm district courts for being right, but for the wrong reason, and we may assume that district courts prefer this to not being affirmed at all. But the courts in the first two of these cases have reversed the Commission outright, and the third has questioned it, not for reaching an impermissible result, nor because it gave a wrong reason, but merely because they chose to think that it had one. We cannot accept this approach. If a commission or other body is doing something it would be authorized to do, the presumption should be that it was acting within its authority. With all due respect, we think these courts have lost sight of this principle in a forest of pedagogy.

Eastern contends that it appears of record that the Commission in fact relied upon section 709(a), and that this fact vitiates the charters in any event. We do not so construe the record.[5] But even if the Commission failed to make an exact analysis of the separate scope of each section of the act, Eastern's conclusion would not follow. The argument goes that such action would involve a determination that the fixed rate charged under section 5(b) was "consistent with the policies of [the] Act" as that section requires, which in turn would mean, Eastern says, that to charge anything further was inconsistent with the policies of the act. We do not subscribe to this reasoning. Rather,

[5] Essentially Eastern's argument is that the Commission constantly used the phrase "additional charter hire," and since this phrase appears in section 709(a) that is what it must have been proceeding under. "Additional charter hire" is not such a phrase of art that it must be so identified. On the contrary, it is accurately descriptive of the contingent charges no matter what was its source.

we assume the Commission determined that this particular fixed charge was consistent provided it was accompanied by the contingent obligations elsewhere provided for. Eastern's argument would lead to the strange result that even if the Commission was authorized to conclude that the larger percentages could be appropriate charter hire in a proper case, when the Commission charged them it felt they were inappropriate. For this Eastern must carry a heavy burden of proof which we hold it has not met.

We accordingly conclude that the only question for decision is whether, in point of fact, the Commission had authority to make charters requiring the payment of more than 50 per cent of the net voyage profits. Because of their interrelationship we must consider both the 1936 and the 1946 acts. The 1936 Act covered a number of subjects. Subchapter VII, entitled Private Charter Operation, authorized the Commission to recondition old merchant vessels, and to construct new ones, in private yards by competitive bids. The Commission was then authorized to charter such vessels by competitive bidding, section 706, 46 U.S.C. § 1196, or, in certain circumstances, without bidding, section 714, 46 U.S.C. § 1204. In the case of competitive bids the Commission was to accept, subject to certain, here irrelevant, conditions, the "bidder proposing to pay the highest monthly charter hire." Section 707, 46 U.S.C. § 1197. In all cases, the Commission was to demise "upon an annual charter hire of not less than 5 per centum of the [statutorily determined] foreign cost . . . plus 3½ per centum of the depreciated foreign cost." Sections 706, 714 (as amended), 46 U.S.C. §§ 1196, 1204. Also, in both cases there was applicable section 709(a), 46 U.S.C. § 1199, entitled "Excess Profits," quoted *supra*, containing the 50 per cent profit obligation with which we are presently concerned.

In the 1946 Act there was substituted for competitive bidding authority in the Commission to negotiate and set

rates, subject to certain floors. Section 5(b), *supra*. The Commission was bound by another floor as the result of the incorporation of section 709(a) of the 1936 Act. Eastern's position is that this section also set a ceiling. It states, to the point of redundance, that "shall" when used in that section was a "mandatory" word, and that a requirement that an agreement "shall" contain a certain profit-sharing obligation makes it mandatory that it not contain a greater one. We may agree that in this case "shall" was used in a mandatory sense. It does not necessarily follow, as Eastern would have us believe, that there was an implicit mandatory negative.

We start with the familiar maxim, singularly not referred to by either party, *expressio* (or *inclusio*) *unius est exclusio alterius*. It is universally held that this maxim is a guide to construction, not a positive command. This is sufficient answer to Eastern's primary contention. Whether the specification of one matter means the exclusion of another is a matter of legislative intent for which one must look to the statute as a whole. *Springer* v. *Gov't of the Philippine Islands*, 1928, 277 U.S. 189; *City of New York* v. *Davis*, 2 Cir., 1925, 7 F.2d 566; *Simmons* v. *County of Suffolk*, 1918, 230 Mass. 236; *Esso Standard Oil Co.* v. *Holderman*, 1962, 75 N.J. Super. 455; *State ex rel. Curtis* v. *De Corps*, 1938, 134 Ohio St. 295; *Industrial Trust Co.* v. *Goldman*, 1937, 59 R.I. 11; *Attorney General of Utah* v. *Pomeroy*, 1937, 93 Utah 426; *Colquhoun* v. *Brooks*, 1888, 21 Q.B.D. 52, 65. An apt illustration that this is a matter of interpretation in each case may be found in *Attorney General of Utah* v. *Pomeroy*, *supra*. There the court pointed to the constitutional requirement that no person "shall be convicted of Treason unless on the Testimony of two Witnesses . . ." Could this mean, the court asked, that the government's case would fail if there were three. So, here, whether a provision that the government's price setting agent, the Commission, must provide for a recapture of 50 per cent of the net voyage profits in excess of 10 per cent

means that it could not provide for more must be determined on the circumstances as a whole.

On the matter of legislative intent, some of Eastern's arguments are readily disposed of. It cites the proposition that if two statutes conflict, the specific must control the general. Hence, it says, section 5(b), which gives discretion to the Commission to fix rates, must be controlled by section 709(a), which limits that discretion in a certain particular. This does not bolster Eastern's point; it merely assumes it. In the same manner it says that section 5(b) limits the Commission's authority to charters which are "consistent with the policies of this Act," and that section 709(a) represents that policy. Again, this does not help us to construe section 709(a), but only takes us back to the starting point. The question remains, to what extent does section 709(a) seek to control section 5(b)?

Eastern says that if section 709(a) was not intended to set a ceiling as well as a floor, it should have contained the words "not less than." Statutes are not always drawn with such particularity, but may leave such matters to implication. Moreover, when a section is adopted bodily from some other act, care is not necessarily exercised to consider every difference which might arise under the changed conditions. We would agree with Eastern that in the 1936 Act, where section 709(a) was to be read in conjunction with section 706, section 709(a) was, as a practical matter, both a floor and a ceiling. The reason is obvious. Under section 707 competitive bids were to be judged by the "highest monthly charter hire." Hence no bidder would propose a higher profit-sharing provision than that required by section 709(a) because this would be to assume a burden to no purpose. By the same token the Commission would have no basis for imposing larger percentages. This was an understandable and desirable result. It might be difficult for the Commission, as a ministerial matter, to

determine which was the "highest" bid if there were submissions varying not only in the fixed rate but in the contingency rate as well. When section 709(a) was inserted into an act which, subject to certain floors, gave the Commission itself power to set rates, it does not follow that it must be taken as reading a mandatory ceiling into that new procedure. The fact that a statute may point in a certain way when employed in one connection does not mean that it must be read exactly the same way in another connection. As we held in *Sherman* v. *Hamilton*, 1 Cir., 1961, 295 F.2d 516, *cert. den.* 369 U.S. 820, the answer depends upon the total context.[6]

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[6] For this reason, even if Eastern's argument based upon the legislative history of section 709(a) in 1936 were sound, we would reject it. In fact it is not sound. Eastern states that a "proposal [for a sliding profit scale] was rejected, and Congress instead adopted the mandatory 50 percent profit sharing provision of section 709(a) . . ." Due to omissions this statement is highly misleading. The proposed sliding scale (which set no rates, and hence would have permitted the Commission to set even as maxima very modest amounts) was contained in section 47 of S. 4110, 74th Cong., 2d Sess. (1936), a bill introduced by Senator Guffey. But the "rejection" by the Senate Committee on Commerce, was not of the section 47 proposal, but, rather, of the entire bill, on the ground that government chartering was, per se, undesirable. The complaint was that chartering was a give-away. See S. Rep. 1721, 74th Cong., 2d Sess. (1936). Subsequently, Senator Guffey prepared a new version of his bill, in which section 47(a) contained the language now in section 709(a) of the act. See H.R. 8555, Amendments intended to be proposed by Senator Guffey, April 24 (Calendar day, May 4), 1936, 74th Cong., 2d Sess. Senator Guffey apparently never introduced this version of his bill into the Senate. Instead, he joined with Senators Gibson and Copeland in introducing a new bill which also included a section containing the language now in section 709(a) of the act. See 80 Cong. Rec. 9885 (1936); § 709(a), H.R. 8555, Committee Print, June 13, 1936, 74th Cong., 2d Sess. This section was accepted without amendment. While this particular section may have been designed generally to meet "give-away" objections, we cannot draw any conclusions from this history helpful to Eastern.

Eastern makes a further argument which really goes back to the 1936 Act, but is couched in terms of construing section 709(a) in conjunction with section 5(b) of the 1946 Act. In substance it is that under section 709(a) "net voyage profits" are determined by deducting "the charter hire reserved in the charter and . . . reasonable overhead . . . ." and that if the so-called larger percentages were in fact imposed under section 5(b) they would constitute part of "the charter hire reserved in the charter" and therefore would have to be so credited, with consequent confusion. It may be conceded that when section 709(a) was to be read in connection with charters made pursuant to section 706 of the 1936 Act, for reasons already discussed no larger percentages would be entailed because no bid would have included any such amounts. Possibly if Congress had been starting from scratch in 1946 it would not have devised exactly the section 709(a) language. But this does not mean that this language is inconsistent with the Commission's determination under section 5(b) to charge larger percentages. On the contrary, it seems to us that Eastern's argument is forced and unnatural. Section 709(a) required that every charter contain a provision for the payment of one half of the net profits (as therein defined) as "additional charter hire." At the same time it provided that "charter hire" was to be deducted to determine the profits. Hence, if Eastern wishes to be entirely literal, it would have to say that even as to the 50 per cent profit payment, this is part of the "charter hire" and so is ordered to be deducted. Obviously, such a strict reading of the language is absurd, for as a matter of common sense profits are not deducted in order to determine profits. Eastern naturally does not so read the language when it is considering the 50 per cent profit provision. It only seeks to do so when the percentages are larger. We do not believe that such manufactured complications show the intent of Congress.

In sum, we find no specific, single answer to the question of intent. We turn to more general matters. Eastern alleges that the policy of the 1946 Act was to assist the shipping industry. This may be conceded. The act had other purposes as well. The very fact that the Commission could in no case make a lease calling for less profit-sharing than is specified in section 709(a) shows that Congressional liberality was not unlimited. Even more uncompromising is the final clause in section 5(b) which provided that if the Commission in a particular case voted to charge less than the regular 15 per cent minimum provided in that section, the charter hire should in no event be "less than the prevailing world market charter rates." It is difficult to regard this as an indication of general beneficence. The reason is clear. The dominant purpose of the 1946 Act was to sell vessels, not to charter them. At all times preference was to be given to applicants proposing to purchase. Section 7(a), 50 U.S.C. App. § 1740(a). In fact a vessel could not be chartered at all until it had been advertised for sale for 60 days. Section 5(a), 50 U.S.C. App. § 1738(a). Rather than trying to temper the wind to charterers, we must conclude that the important consideration was to avoid making charters too cheap. As the court said in *American President Lines, Ltd.* v. *United States*, 3 Cir., 1959, 265 F.2d 552, 553, quoting the district court, "[I]f the hire were made too attractive the pronounced policy to demise vessels outright would be thwarted. No prudent business man would purchase a commodity which could be leased at a comparatively more favorable price."[7]

[7] The phrase "consistent with the policies of this Act," which Eastern argues means "be kind to shippers," not only may refer to this other purpose, but there is evidence that in fact it was so intended. "Inasmuch as the policy of the measure is to put as many war-built vessels as possible into private ownership, the Commission is directed not to approve applications to charter unless such chartering is consistent with the policies of the Act." S. Rep. No. 807, 79th Cong., 1st Sess. 13 (1945).

This did not mean that charterers were to be taken advantage of. Congressional aid to shippers, tangibly expressed by subsidy provisions which could cushion losses to charterers as well as to owners, remained in effect. *Cf. United States* v. *Moore-McCormack Lines, Inc.*, 4 Cir., 1962, 308 F.2d 866. But certainly an intention to aid shippers did not mean that every provision in the act was to be construed against the government. We suggest that the very existence of the subsidy is a reason for not restricting the freedom given to the Commission under section 5(b) to negotiate for amply large initial charter rates.[8]

In section 5(b) Congress gave the Commission discretion to charge such rates as it felt appropriate, except that it established two floors. In section 709(a) it established another floor. These floors were specifically and unambiguously stated. Eastern's asserted ceiling exists, at best, only by implication. While we would be prepared to find such an implication if it seemed called for, we believe that limitations upon an otherwise general grant of power should not lightly be inferred. *Springer* v. *Gov't of the Philippine Islands, supra; cf. Esso Standard Oil Co.* v. *Holderman, supra; State ex rel. Curtis* v. *De Corps, supra.* Viewing this statute as a whole our disposition is against doing so. We accept the assumption, or conclusion, of the three cases initially discussed, and hold that the Commission was authorized to include the larger percentages in the charters.

Although we have reached this decision independently we do not wish, by silence, to deny the validity of certain other of the government contentions, particularly its point

[8] Actually, the government makes a persuasive argument that within the framework of this act it could be to the advantage of shippers to permit the Commission to charge more than 50 per cent of graduated profits, for if it could not do this it might feel called upon to demand a larger fixed fee. If a venture proved unsuccessful, the higher fixed rate could obviously be disastrous.

that in case of ambiguity it is appropriate to give weight to the view of the body entrusted to administer the act. *American Power & Light Co.* v. *S.E.C.*, 1 Cir., 1944, 141 F.2d 606, *aff'd*, 329 U.S. 90; *West Texas Utilities Co.* v. *N.L.R.B.*, D.C. Cir., 1950, 184 F.2d 233, *cert. den.* 341 U.S. 939; *North American Utility Securities Corp.* v. *Posen*, 2 Cir., 1949, 176 F.2d 194. One cannot fail to be impressed by the attention which the Commission gave to the desirability of charging the larger percentages and to the reasons which motivated it. However, we regard this as unnecessary to our decision.

The second aspect of the case is Eastern's contention that the Commission had no power to change the basis of accounting, and hence worsen its position under the charter, in September 1947, by terminating the charter and granting a new one.[8] Since the charter was terminable at will, this change was normally the Commission's right. *Gebhard* v. *Royce Aluminum Corp.*, 1 Cir., 1961, 296 F.2d 17. Eastern's complaint is bottomed on the argument we have already considered, that section 709(a) was for the benefit of shippers and set a ceiling upon the Commission's authority with respect to profit-sharing agreements. This part of its case must fall with the other.

Finally, Eastern makes a separate contention with respect to two single voyage subcharters made by Eastern just before September 1, 1947 and consented to by the Commission pursuant to a clause in the charter requiring its consent to any subcharter or assignment. Eastern takes the position that, irrespective of section 709(a), this assent prevented the Commission from terminating or modifying the charter with respect to these two vessels until these voyages had been completed. The provision requiring the Commission's assent was inserted for the government's

[8] Eastern says in reality the Commission rewrote the charter. Whether this is the substance of the matter makes no present difference.

benefit, not for Eastern's. Indeed, Eastern agrees that the Commission might have terminated the charter outright on September 1 in spite of this assent. In that case Eastern would have been under no obligation to the subcharterers because their agreements contained a provision releasing Eastern in case of "frustration," and an outright termination of the charter would have been obvious frustration. Eastern's point is that the Commission's grant of a new charter, although on different terms, deprived it of this defense, and consequently the government should be held to the original charter. We cannot believe that the Commission's permitting Eastern to make a subcharter was intended as an enlargement of Eastern's rights.

Judgment will be entered affirming the judgment of the District Court.

COMPARATIVE PROVISIONS OF THE STATUTES, THE REGULATIONS, AND THE CHARTERS

THE STATUTES

MERCHANT SHIP SALES ACT OF 1946
[50 U.S.C. App. 1735(b)]

Charter of War-Built Vessels to Citizens

SEC. 5. * * *

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

* * *

SEC. 7. * * *

(b) After the cessation of hostilities, operation of vessels in commercial service by the United States, either for its own account or through operating agents under agency agreements, shall, except as to the Panama Railroad Company and other services specifically authorized by law, be continued only to the extent necessary to effect orderly transfer of vessels to private operation.

MERCHANT MARINE ACT, 1936
[46 U.S.C. 1199]

TITLE VII -- Private Charter Operation

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the

THE REGULATIONS

GENERAL ORDER NO. 60, AS AMENDED

SUBPART C--CHARTER OF WAR-BUILT VESSELS TO CITIZENS

299.31 Charter of war-built vessels to citizens of the United States --

* * *

(f) Charter hire. The monthly charter hire for any vessel chartered under the provisions of the Act shall be one-twelfth of an amount not less than 15% of the statutory sales price (computed as of the date of delivery of the vessel under the charter), except upon the affirmative vote of not less than four members of the Commission. Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission.
[46 C.F.R. 299.31(f)]

(g) Mandatory provisions in charter. Every charter made by the Commission pursuant to the provisions of the Act shall provide:

(1) Excess profits of charterer. That whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the short sea

WAR SHIPPING ADMINISTRATION

BAREBOAT CHARTER AGREEMENT

"WARSHIPDEMGLSCOUT 203"

CLAUSE E. Rate of Basic Charter Hire. Unless otherwise specially agreed, such rates as appear opposite the name of each Vessel listed in Clause C(1) and such addenda as may be executed.

* * *

CLAUSE C. (1) Vessels Chartered and Other Details. The Vessel or Vessels to which this agreement relates, and the respective ports of delivery (if known) and applicable operating limits are as follows or as may be included hereunder by Addenda hereafter executed:

Name and Type of Vessel	Port of Delivery	Basic Hire Per Calendar Month	Valuation	Operating Limits as Specified in Clause:

CLAUSE 12. Basic Charter Hire. The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

CLAUSE 13. Additional Charter Hire. After redelivery of all Vessels under this Agreement, if the cumulative net voyage profits computed for the period of the agreement (after the payment of the basic charter hire provided herein and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall be in excess of a rate of ten (10) per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels during the period of the agreement (all as

COMPARATIVE PROVISIONS OF THE STATUTES, THE REGULATIONS, AND THE CHARTERS

THE REGULATIONS

GENERAL ORDER NO. 60, AS AMENDED

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CLAUSE 13. Additional Charter Hire. After redelivery of all Vessels under this Agreement, if the cumulative net voyage profits computed for the period of the agreement (after the payment of the basic charter hire provided herein and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall be in excess of a rate of ten (10) per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels during the period of the agreement (all as hereinafter defined in Clause 23) the Charterer shall pay

CHARTER NO. MCc-41881

(Dated as of October 1, 1946)

CLAUSE E. Rate of Basic Charter Hire. Unless otherwise specially agreed, such rates as appear opposite the name of each Vessel listed in Clause C(1) and such addenda as may be executed.

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Name and Type of Vessel	Port of Delivery	Basic Hire Per Calendar Month*	Valuation	Operating Limits as Specified in Clause:
MERRIMAC SEAM (EC2-S-AW1)		$ 7,987.50	$ 639,000	D1(a)

* 15% per annum of either the unadjusted statutory sales price or the floor price of the vessel, whichever is higher.

CLAUSE 12. Basic Charter Hire. The Charterer shall pay to the Owner the basic charter hire at the monthly rate provided for in Part I hereof from the day and hour of delivery of the Vessels until and including the day and hour of redelivery to the Owner pursuant to the terms of this Agreement; or if any Vessel shall be lost, hire shall continue until the time of her loss, if known, or if the time of loss be uncertain then up to and including the time last heard from. Payment of such basic charter hire shall be made to the Owner at Washington, D. C., on delivery of the Vessel for the remainder of the calendar month in which delivery is made, and thereafter monthly in advance on the first day of each month.

CLAUSE 13. Additional Charter Hire. If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after

charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

* * *

SEC. 7. * * *

(b) After the cessation of hostilities, operation of vessels in commercial service by the United States, either for its own account or through operating agents under agency agreements, shall, except as to the Panama Railroad Company and other services specifically authorized by law, be continued only to the extent necessary to effect orderly transfer of vessels to private operation.

MERCHANT MARINE ACT, 1936
[46 U.S.C. 1199]

TITLE VII -- Private Charter Operation

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum of the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: Provided, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rates for similar vessels for similar use as determined by the Commission. [46 C.F.R. 299.31(f)]

(g) Mandatory provisions in charter. Every charter made by the Commission pursuant to the provisions of the Act shall provide:

(1) Excess profits of charterer. That whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10% per annum on the charterer's capital necessarily employed in the business of the vessel or vessels covered by the same charter, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10% per annum on such capital; Provided, that the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years. . . . [46 C.F.R. 299.31(g)]

* * *

(k) Preliminary determination and payment of "additional charter hire". . . Such payments shall be deemed to be preliminary and subject to adjustment upon the completion of audit by the Commission covering the period involved, and neither the tender thereof by the charterer, nor its acceptance by the Commission, shall prejudice the rights of either under the applicable bareboat charter agreement or otherwise. . . . [46 C.F.R. 299.31(k)]

* * *

(b)(5) That if, in any instance, the rules and regulations prescribed herein should conflict with the provisions of an applicable statute or agreement, such psovisions shall govern; . . . [46 C.F.R. 299.56(b)(5)]

Name and Type of Vessel	Port of Delivery	Basic Hire Per Calendar Month	Valuation	Operating Limits as Specified in Clause:

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CLAUSE 13. Additional Charter Hire. If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall exceed 10 per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels (all as hereinafter defined), the Charterer shall pay over to the Owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day - 50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day - 75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day - 90% on such excess over $300 per day.

* * *